

D.T.E. 03-70

Rulemaking by the Department of Telecommunications and Energy to amend 220 C.M.R. §§ 272.00 et seq., regarding the maximum rates and charges for the towing and transportation of vehicles ordered by the police or other public authority subject to G.L. c. 159B, § 6B.

ORDER ADOPTING FINAL REGULATIONS

I. INTRODUCTION

On July 10, 2003, the Statewide Towing Association, Inc. (“STA”) petitioned the Department of Telecommunications and Energy (“Department”) to amend its regulations, 220 C.M.R. §§ 272.00 et seq., in order to increase the maximum rates and charges allowed for police-ordered towing of motor vehicles pursuant to G.L. c. 159B, § 6B and G.L. c. 266, § 120D.¹ STA is a statewide towing association representing approximately 300 towing companies, a majority of which perform police-ordered towing (Exh. STA-1-C at 1; Tr. at 16). The Department docketed this matter as D.T.E. 03-70, and on October 10, 2003, the Department issued an Order Instituting a Rulemaking. The Department filed notice of its intention to conduct a rulemaking proceeding with the Secretary of State’s Office of Regulations, as required by 950 C.M.R. §§ 20.00 et seq. See Massachusetts Register No. 985, published October 24, 2003.

Pursuant to notice duly issued, on December 4, 2003, the Department held a public hearing on the proposed amendments to the regulations at the Department’s offices in Boston. The Department received written comments in support of the amendments from State Representative John Scibak. At the hearing, STA sponsored the testimony of three witnesses: Kimberly R. Lowell, former president of STA and an independent consultant to the towing

¹ General Laws c. 159B § 6B states: “The Department shall establish the maximum charges that may be made . . . when such towing is ordered by the police or other public authority.” General Laws c. 266, § 120D states: “[T]he registered owner of a vehicle illegally parked . . . shall be liable for charges for the removal . . . of such vehicle; . . . not [to] exceed . . . the maximum amount for towing . . . of motor vehicles established by the [D]epartment.”

industry; Peter Aspesi, former president of STA, and a tow operator; and William Johnson, president of STA. The evidentiary record consists of six exhibits, testimony, and comments.

II. STA'S PROPOSED AMENDMENTS TO REGULATIONS, NOTES AND TABLES

A. Introduction

The Department's regulations at 220 C.M.R. §§ 272.00 et seq. establish maximum rates for towing and transportation of motor vehicles that have been ordered by the police or other public authorities and for trespass tows, pursuant to G.L. c. 159B, § 6B, and G.L. c. 266, § 120D, respectively. STA has proposed modifications to certain definitions contained in 220 C.M.R. § 272.01 ("Section 272.01") and to 220 C.M.R. § 272.03 ("Section 272.03"), which lists applicable towing rates. The Department last modified 220 C.M.R. §§ 272.00 et seq. in Statewide Towing Association, D.P.U. 97-37 (1997).

B. Section 272.01: Definitions

STA seeks to make five modifications to definitions that are listed in Section 272.01 (Exh. STA-2). First, STA proposes to eliminate from the definition of "Commercial Motor Vehicle" the phrase "and any other motorized vehicle weighing 4,000 pounds or more or any other vehicle which may display a commercial plate" and replace it with the phrase "or any other vehicle which may display a plate other than a passenger or motorcycle plate" (id.). Second, STA proposes to eliminate the definition of "Gross Weight" (id.). Third, in the definition of "Passenger Automobile," STA proposes to change the phrase "a motor vehicle capable of transporting not more than eight passengers and a driver" to "a motor vehicle capable of transporting not more than eight passengers and a driver, and displaying a passenger

or motorcycle plate” (id.). Further, STA proposes to eliminate the sentence “A passenger automobile also includes an ambulance hearse and flower car” (id.).

Lastly, STA proposes to define “Service and/or Waiting Time” as the “elapsed time the service vehicle is waiting to provide service at the scene, winching and/or utilizing service vehicle equipped industry standard tools or equipment” (id.). This new definition is a technical addition intended by STA to maintain consistency with changes to Section 272.03.

C. Section 272.03: Table 1 and Table 2

STA seeks changes to Tables 1 and 2 of Section 272.03.² Specifically, STA proposes five modifications to Table 1, which pertains to towing rates for passenger vehicles:

(1) increasing the maximum charge for towing passenger automobiles, motorcycles, motor bikes and motor scooters a distance of up to five miles from the present fixed charge of \$75.00 to \$90.00 (Exh. STA-2); (2) increasing the current excess mileage rate of \$1.25 per mile to \$3.50 per mile (id.);³ (3) eliminating the current restriction against applying additional labor charges to snow removal towing (id.); (4) replacing the phrase “Wrecker Working While Standing and also Waiting Time” with the phrase “Service and/or Waiting Time” (id.); and (5) increasing and incorporating the Additional Labor rate listed in Table 3 from \$27.00 per hour to \$32.00 per hour or any fraction thereof (id.).

² Table 1 and Table 2 list applicable towing rates for passenger and commercial vehicles.

³ The excess mileage charge applies per mile after the first five miles that a vehicle is towed.

STA proposes four modifications to Table 2, which pertains to towing rates for commercial vehicles: (1) increasing the maximum charge for towing a distance of up to five miles from the current fixed rate of \$75.00 to \$90.00 (Exh. STA-2); (2) raising the current excess mileage rate of \$1.75 per mile to \$5.00 per mile (id.); (3) eliminating the language in Section 272.03 that defines commercial vehicles weighing over 4,000 pounds (consistent with its proposed changes to Section 272.01) (id.); and (4) discouraging excess litigation by adding a sentence that states, “The owner of the vehicle and the carrier may agree jointly in writing to submit disputes regarding charges assessed for the recovery of a disabled commercial motor vehicle for binding arbitration to the Transportation Division and/or the D.T.E. Commission” (id.).

STA requests that the Department eliminate Table 3 (Exh. STA-2). If the Department approves its proposed modifications to Tables 1 and 2, Table 3, which pertains to labor charges, becomes unnecessary.

In support of its proposed modifications to Table 1 through Table 3, STA provides a survey (“STA Survey”) that was completed by approximately 300 STA members regarding their annual revenues and expenses, number of employees, number of vehicles, wages paid, number of tows performed, depreciation, and other expenses for the period January 1, 2002 to December 31, 2002 (Exh. STA-1-C at 3-5). Because the survey included STA members who perform towing services throughout the Commonwealth, STA considers the results of the STA Survey to be representative of the revenues and costs experienced by the towing industry in Massachusetts (id.).

Based on the STA Survey, STA determined that the average expense per police-ordered tow during the reporting period was \$113.93 (Exh. STA-1-C at 6). STA adjusts this result by adding a per tow fuel expense adjustment⁴ of \$1.77, thus producing an adjusted total average expense per tow of \$115.70 (id.).

To determine an appropriate rate to charge given expenses of \$115.70 per tow, STA relies on the operating ratio method (id.).⁵ The operating ratio method has been used by the Department in the past to determine rates and charges for towing companies and for other common carriers. See e.g., Statewide Towing Association, D.P.U. 97-37, at 4-13 (1997); Peter Pan Bus Lines, D.P.U. 867, at 21-22 (1982); Worcester Gray Line, D.P.U. 785/786, at 4-5 (1982); Kinson Bus Lines, D.P.U. 632, at 6-7 (1982); Police-Ordered Tows, D.P.U. 20148, at 11-14 (1980). The Department has previously approved an operating ratio of 90 percent for towing companies. D.P.U. 97-37, at 4-13.

Consistent with this precedent, STA applies an operating ratio of 90 percent to the adjusted total average expense per tow of \$115.70. This calculation increases the average expense per tow by \$12.86 to \$128.56 (Exhs. STA-1-C at 7; STA-1, sch. 1).

STA states that total average revenue per tow is \$107.15, including storage revenues of \$34.79 (Exh. STA-1, sch. 1). By comparing the total average expense per tow of \$128.56 to total average revenues per tow of \$107.15, STA concludes that the average revenue

⁴ The fuel expense adjustment accounts for increased cost of fuel in 2003 (Tr. 22).

⁵ The operating ratio is determined by dividing total operating expense by total operating revenues. D.P.U. 785/786, at 4-5.

deficiency per tow was \$21.41 (id.; Tr. at 20). STA proposes to recover this revenue deficiency through an increase in the fixed rate for the first five miles of a tow from \$75.00 to \$90.00 per tow and an increase in the excess mileage rates to \$3.50 per mile for passenger automobiles and \$5.00 per mile for commercial vehicles (Exhs. STA-2; STA-1-C at 3; STA-1, sch.5, at 2).

D. Notes

Section 272.03 includes seven notes explaining the applicable towing charges listed in Tables 1 and 2. STA requested several modifications to Note 1, which describes when additional towing charges may apply. First, consistent with STA's proposed changes to Tables 1 and 2 regarding additional labor and the resulting elimination of Table 3, STA has proposed that the "Service and/or Waiting Time" charge contained in the first paragraph of Note 1 be increased from the current \$30.00 per half-hour to \$35.00 per half-hour after one hour at the scene (Exh. STA-2).

Second, STA proposes to eliminate the current restriction against applying Note 1 to snow removal tows (id.). This proposed amendment would allow tow operators to charge for "Service and/or Waiting Time" during snow removal towing, thereby permitting an extra \$35.00 charge if the tow vehicle is on site for more than one hour, or if additional equipment is called to the site. In support of its request to allow extra labor charges to be billed on snow removal tows, STA states that because most snow tows are performed two to four hours after a snowstorm begins, tow operators may need to spend considerable time digging to remove a vehicle (Tr. at 35). STA also states that most snow tows are ordered between midnight and

6:00 a.m., which requires the tow operators to compensate the drivers at a significantly higher hourly rate than normal (id.).

Third, STA proposes to increase the “additional service vehicle” charge be raised from \$75.00 per additional vehicle to \$90.00 per additional vehicle (Exh. STA-2). This is intended to maintain consistency with changes requested in Table 1 and Table 2 (id.).

STA also proposes that Note 6 be deleted, consistent with the proposed modification in Table 3, by replacing the additional labor rate of \$27.00 per hour with \$32.00 per hour, and incorporating the revised Note 6 language into Table 1 (id.). This modification is intended to bring the computation method for labor charges into conformance with the applicable labor charge found in Table 3 and if approved the current Note 7 would become Note 6 (id.).

III. ANALYSIS AND FINDINGS

A. Introduction

The purpose of this rulemaking is to establish the maximum rate allowed to be charged by Massachusetts towing operators for involuntary tows.⁶ The Department sets maximum allowed rates to be charged by towing companies. G.L. c. 159B, § 6B. In setting maximum rates, the Department seeks to enable all tow operators, operating under efficient management, to earn a reasonable amount for towing services. Statewide Towing Association, D.P.U. 97-37, at 6 (1997).

⁶ Involuntary tows include police or other public authority-ordered tows and trespass tows. G.L. c. 159B § 6B.

While the Department sets maximum rates allowed to be charged for towing services, towing companies are encouraged to charge a lower rate. For example, in many municipalities, police-ordered towing is subject to a contract rate based on bids, or on a negotiated rate between the municipality and the tow operators doing business in a municipality. Id. at 7. These contractual or negotiated rates can result in a rate lower than the maximum rate set by the Department. Id. The Department encourages municipal efforts to reduce towing costs to the general public.

B. Proposed Changes to Definitions

As stated above, STA seeks to modify the existing definitions of commercial and passenger motor vehicles delineated in 220 C.M.R. § 272.01 (Exh. STA-2). The proposed changes limit vehicles eligible for the passenger automobile tow rate to vehicles displaying a passenger plate (id.). The Department finds that STA's proposed changes provide a more precise definition of a passenger automobile than the current regulations and are reasonable. Therefore, the proposed changes are approved.

C. Proposed Changes to Tables

STA seeks to increase rates now being charged by tow operators (id.). The proposed rates have been calculated based on a cost study conducted by STA (Exh. STA-1, schs. 1-4). The towing industry consists primarily of small-business tow operators who do not maintain records at the level of detail and sophistication necessary to perform an in-depth cost of service analysis similar to those required by the Department for other rate proceedings (Exh. STA-1-C at 4). The Department previously has determined to rely on surveys similar to the one

presented in this case to establish reasonable towing rates. See D.P.U. 97-37, at 7-8 (the Department found that STA's survey provides an adequate starting point to assess the level of rate relief). In this case, STA performed a survey and provided information, revenues, and expenses from member tow operators whose towing businesses differ in size, revenues, and service territory (Exh. STA-1, schs. 1,4). Given the diversity of the respondents, we find that the STA Survey is sufficient to serve as a basis to assess the revenues, expenses, and rates of the towing industry.

Regarding the towing charge, the evidence indicates that the current basic towing charge of \$75.00 does not allow tow operators to cover expenses (Exh. STA-1, sch. 1). The Department finds that increasing the basic tow rate to \$90.00, as proposed by STA, is reasonable as it would enable tow operators to cover their expenses, which have increased considerably since the Department last investigated towing rates in D.P.U. 97-37 (id.). Therefore, the proposed increase is approved.

Regarding the excess mileage charges, the Department notes that the current excess mileage charges of \$1.25 per mile for passenger automobiles, and \$1.75 per mile for commercial vehicles, has not changed since 1980, a period of over 24 years. D.P.U. 97-37, at 8, n.4; Policed Ordered Tows, D.P.U. 20148, at 23-24 (1980). Further, the 2004 Northeast Area Consumer Price Index, as published by the U.S. Department of Labor's Bureau of Labor Statistics in June 2004, supports a 145.28 percent increase to \$3.00 for passenger automobiles and \$4.25 per mile for commercial vehicles. STA produced no evidence to support additional increases to \$3.50 and \$5.00 respectively. Therefore, the Department approves the excess

mileage charges to be increased to \$3.00 per mile for passenger vehicles and \$4.25 per mile for commercial vehicles.

To determine whether to incorporate and increase the regulation's current Table 3 Additional Labor rate from \$27.00 per hour to \$32.00 per hour or any fraction thereof, the Department examined information provided in the STA Survey, including required additional labor services such as digging or lifting, prevailing wage rates, and employee expenses such as overtime pay and health benefits (Exh. STA-1, schs. 1-5). The evidence indicates that, when additional labor is needed during involuntary tows, expenses exceed revenues for tow operators (Exh. STA-1, sch. 5 at 3). Accordingly, the Department finds that the proposed increase to the "additional labor charge" is necessary to enable towing companies to recover expenses and is reasonable. The Department also approves STA's request that the Department incorporate Table 3 into Table 1 (Exh. STA-2).

Regarding the modification of Table 2 that would allow commercial vehicle owners who dispute charges assessed for the recovery of a disabled commercial vehicle to agree to binding arbitration before the Department (Exh. STA-2), we note that G.L. c. 159B, § 6B directs the Department to set maximum rates. The statute does not provide the Department with jurisdiction to resolve billing disputes between towers and commercial customers. Therefore, the Department denies STA's proposed modification to Table 2.

The last paragraph of Table 2 currently states that the Department may review charges assessed for recovery⁷ of a disabled commercial motor vehicle. As we have stated above, G.L. c. 159B, § 6B directs the Department to set maximum rates, which does not include recovery charges. Because our jurisdiction is limited and because owners of disabled commercial vehicles have other forums to pursue disputes, the Department approves elimination of this paragraph from the current regulations.

D. Proposed Changes to Notes

STA seeks two changes to Note 1. First, STA seeks to increase the “Service and/or Waiting Time” charge from \$30.00 per half hour to \$35.00 (Exh. STA-2). This increase is consistent with the proposed increases that we have approved in this Order at 9-10 in (1) the basic towing charge from \$75.00 to \$90.00 per tow and (2) the additional labor rate from \$27.00 to \$32.00. The increased operating costs associated with the first hour of a tow would also be incurred during subsequent hours. Therefore, the Department approves the increase from \$30.00 per half-hour per vehicle to \$35.00.

Second, STA seeks to increase the rate to be charged when an additional vehicle is needed for a tow from \$75.00 to \$90.00(Exh. STA-2). This increase is consistent with the proposed increase in the basic towing charge from \$75.00 to \$90.00 per tow that we have approved in this Order at 9. A tow operator’s second vehicle shares the same cost characteristics as a first vehicle. Consequently, the increased operating costs and

⁷ 220 C.M.R. § 272.03 defines recovery as wrecker working, winching, waiting time, clean up time and the provision of special equipment needed to place the disabled commercial vehicle in position to be towed.

non-recurring overhead associated with the first vehicle would also be incurred by to a second vehicle. Therefore, the Department approves that the proposed increase to the additional service vehicle rate.

STA also seeks to eliminate Note 6. The Department finds that to maintain consistency within the rates already approved in this Order, Note 6 will be stricken in its entirety and the current Note 7 will be renumbered as Note 6.

Finally, with respect to STA's proposal to allow additional charges for snow removal tows, the Department has previously found that snow removal tows are similar in nature to trespass tows because they are routine and, thus, would not require extra equipment or additional waiting time. Statewide Towing Association, D.P.U. 94-60, at 8 (1996). In this proceeding, STA has presented testimony that snow removal tows can be more difficult than the typical procedure outlined in D.P.U. 94-60 (Tr. at 35). STA argues that because tow operators are not generally called upon by public authorities to clear vehicles from the streets until after a significant amount of snow has fallen, snow removal towing may, on occasion involve additional digging work, and that operators should be compensated for their time (id.). The Department finds this argument is speculative. Accordingly, STA's proposal to charge for additional labor associated with snow removal tows is denied.

IV. ORDER

Accordingly, after due notice, hearing, and consideration, it is

ORDERED: That 220 C.M.R. §§ 272.00 et seq. be amended to incorporate the revisions contained in this Order, and that the Regulations appended hereto be effective upon publication in the Massachusetts Register; and it is

FURTHER ORDERED: That the Secretary of the Department of Telecommunications and Energy attest to a true copy of the regulations and transmit said attested true copy to the Office of the Secretary of the Commonwealth of Massachusetts for publication in the Massachusetts Register for inclusion in the Code of Massachusetts Regulations and that said 220 C.M.R. §§ 272.00 et seq. be effective upon publication in the Massachusetts Register.

By Order of the Department,

Paul G. Afonso, Chairman

W. Robert Keating, Commissioner

Eugene J. Sullivan, Jr., Commissioner

Deirdre K. Manning, Commissioner